

MINUTES
OF THE
ENVIRONMENTAL PROTECTION COMMISSION
MEETING
NOVEMBER 10, 2008

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MEETING MINUTES

CALL TO ORDER

The meeting of the Environmental Protection Commission was called to order by Chairperson Henry Marquard at 10:05 a.m. on Monday, November 10, 2008 in the Ingram Office Building, Urbandale, Iowa.

COMMISSIONERS PRESENT

Charlotte Hubbell, Vice-Chair
David Petty
Susan Heathcote
Henry Marquard, Chair
Paul Johnson
Martin Stimson
Shearon Elderkin

COMMISSIONERS ABSENT

Sue Morrow, Secretary

ADOPTION OF AGENDA

Susan Heathcote suggested that items 12 & 13 both dealing with underground storage tanks be moved up after item 7.

Motion was made by Susan Heathcote to approve the agenda as amended. Seconded by Paul Johnson. Motion carried unanimously.

APPROVED AS AMENDED

APPROVAL OF MINUTES

Charlotte Hubbell had changes from the October 14th meeting:

Page 2 – Under the September 9, 2008 minute changes

Add: expressed concern about removing them from the 2 ½ tier protection.

Page 25 – Under Susan Heathcote's comment, last paragraph, last sentence insert the word discharged to or has the potential to reach a designated water.

Motion was made by Charlotte Hubbell to approve the September 9, 2008 and October 14, 2008 minutes as amended. Seconded by Shearon Elderkin. Motion carried unanimously.

APPROVED AS AMENDED

DIRECTORS REMARKS

Director Leopold announced that Liz Christiansen, Deputy Director has accepted a position at the University of Iowa as the Director of the Office of Sustainability.

Linda Hanson has retired as the Division Administrator for Management Services. Sally Jagnandan has been the interim Division Administrator.

Lyle Asell, Special Assistant to the Director on agriculture will be retiring within the next couple of months. A vacancy announcement will be sent out soon. If you have recommendations, please send them to the Director.

The State Natural Resources agency leaders symposium will be held at Honey Creek Resort State Park on November 16 – 18. They will be addressing key items such as climate change, renewable energy, sustainability and what role the state plays in these issues.

The Air Quality bureau kicked off the first State Air Plan last week.

The DNR has spent a lot of time and effort on the infrastructure stimulus package. The Governor convened a workgroup specifically for water related issues.

Paul Johnson and the commission as a whole expressed their gratitude to Lyle Asell, Liz Christiansen and Linda Hanson on a job well done.

[The Commission's Reimbursement Policy for travel was distributed for their information.]

INFORMATIONAL ONLY

PUBLIC PARTICIPATION

WALLY TAYLOR, with the Sierra Club said that the DNR is choosing NOT to impose appropriate underground storage tank (UST) regulations on the polluters. The environmental community needs to be involved with these negotiations. We all give lip service to the protection of the environment until it costs money. It's all about the money. I'm asking the EPC to have the backbone that the DNR apparently didn't have and make sure that the original UST regulations are adopted, as they protect the environment.

JOHN NORTH, representing the Iowa Association of Water Agencies said that he was a part of the stakeholders involved with the UST rulemaking. We feel it is appropriate to support the rule as presented. I do understand the concerns but I don't necessarily agree. We believe that the compromise reached will:

- 1) Protect public water supplies
- 2) Provide some protection to the public water supplies and provide funding to the DNR. We feel it's incumbent that we as a state and as the Commission should provide the DNR the authority and resources to do its job.

Our primary concern is protecting the public water supply. These expenses should not be at the cost of the public water suppliers, but of the polluters.

-----End of Public Participation-----

**APPEAL OF DECLARATORY ORDER - FILED BY THE S. MARTINELLI & COMPANY -
RE: 567 IAC 107.2 – DETERMINATION OF WHETHER CARBONATED FRUIT JUICE
IS SUBJECT TO THE IOWA BOTTLE DEPOSIT LAW.**

Jon C. Tack, Attorney with the Department's Legal Services Bureau presented the following item.

On August 15, 2008, S. Martinelli & Company filed a request for a declaratory order stating that carbonated fruit juice is exempt from the Iowa bottle deposit law.

On September 8, 2008, the Department issued Declaratory Order No. 2008-DO-01 finding that carbonated fruit juice meets the definition of soft drink found at 567 IAC 107.2 and is therefore subject to the Iowa bottle deposit law. Rule 567 IAC 107.2 states that "soft drink" means any nonalcoholic liquid other than mineral water or soda water intended for human consumption. Pursuant to section 455C.1(1), the Iowa bottle deposit law applies to carbonated soft drinks.

On September 24, 2008, S. Martinelli & Company filed an appeal of Declaratory Order No. 2008-DO-01. The Commission shall review the Declaratory Order and affirm, reverse, or modify the determination of the Director.

Motion was made by Charlotte Hubbell to affirm the Declaratory order. Seconded by Susan Heathcote. Motion carried unanimously.

DECISION AFFIRMED

**NOTICE OF INTENDED ACTION: CHAPTER 23, AIR QUALITY PROGRAM RULES –
RESCISSION OF VACATED NESHAPS**

Christine Paulson, Environmental Specialist Senior with the Department presented the following item.

The Department is requesting permission from the Commission to proceed with the rulemaking process and publish a Notice of Intended Action to amend Chapter 23 "Emission Standards for Contaminants" of the 567 Iowa Administrative Code.

This rulemaking was presented to the Commission for information in October. At the request of the Commission, the Department removed from the Notice the amendments related to the Clean Air Interstate Rule (CAIR) and Clean Air Mercury Rule (CAMR), and will instead present more

information on these programs at a future Commission meeting. No other significant changes were made to the Notice from what was presented to the Commission in October.

The purpose of the proposed rule changes is to remove from the state air quality rules certain federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court that are being addressed in this rulemaking are the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Boilers and Process Heaters (the Boiler MACT) and the NESHAP for Brick and Structural Clay Products Manufacturing (Brick-Clay MACT).

Over the last year and a half, the D.C. Court has issued rulings on several significant federal programs promulgated by the U.S. Environmental Protection Agency (EPA). The D.C. Court found the regulations to be unauthorized under the federal Clean Air Act (CAA) or otherwise deficient. The vacatur of these federal programs have elicited uncertainty and confusion for regulated industries and for state and local air agencies.

In response to these vacatur, the Department is proposing to remove the now vacated federal regulations that were adopted by reference. The specific rule amendments being proposed are explained in the preamble of the attached Notice. A summary of the vacated federal regulations, the D.C. Court decisions, and the impacts of the vacatur on the Department and on stakeholders is included below and in the Notice preamble.

MACT Regulations

Section 112 of the Clean Air Act (CAA), as amended in 1990, requires EPA to develop a list of source categories or subcategories that emit, or have the potential to emit, Hazardous Air Pollutants (HAP), and to issue regulations for these source categories or subcategories. Section 112 also requires certain subject sources to meet Maximum Achievable Control Technology (MACT) for controlling HAP.

EPA issues the MACT standards for listed source categories and subcategories under the National Emissions Standards for Hazardous Air Pollutants (NESHAP) program. EPA promulgated the NESHAP with MACT standards for brick and structural clay products manufacturing (Brick MACT) on May 16, 2003. EPA promulgated the NESHAP with MACT standards for institutional, commercial and industrial boilers and process heaters (Boiler MACT) on September 13, 2004. The Brick MACT and the Boiler MACT are adopted by reference into the state air quality rules.

CAA Sections 112(g) and 112(j)

Section 112 of the CAA includes provisions to require MACT for major sources of HAP emissions in the event that EPA does not issue MACT standards. Under section 112(g), if EPA has not set applicable emission limits for a category of listed HAP sources, construction of a new major source or modification of an existing major source in the source category may not occur unless the Administrator (or delegated state or local agency) determines on a case-by-case basis that the unit will meet standards equivalent to MACT. Under section 112(j), if EPA fails to promulgate a standard for a listed category or subcategory by the dates established in the CAA, states must conduct a case-by-case MACT determination for each subject source category or

subcategory and include the MACT requirements in each facility's Title V Permit. EPA has delegated authority to the Department to implement and enforce both 112(g) and 112(j) in Iowa.

MACT Vacatur

The D.C. Court issued its decision to vacate the Brick MACT on March 13, 2007, and issued the mandate making the decision final and effective on June 18, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available on-line at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/03-1202a.pdf>

The D.C. Court issued its decision to vacate the Boiler MACT on June 8, 2007, and issued the mandate making the decision final and effective on July 30, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available on-line at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/04-1385a.pdf>

Because of the D.C. Court vacatur, it now appears that sections 112(g) and 112(j) apply to sources affected by the now vacated Boiler and Brick MACTs. Additionally, EPA has informally stated that it plans to re-propose a Boiler MACT by July 31, 2009, and plans to re-promulgate a final Boiler MACT standard by July 31, 2010. EPA has not provided a schedule for re-promulgating the Brick MACT.

Department Activities

At the Department's Air Quality Client Contact meeting on August 14, 2008, the Department discussed the implications of the Boiler MACT vacatur with stakeholders. At the meeting, the Department outlined a tentative, section 112(j) timeline for owners and operators of facilities with boilers and process heaters. The Department sent letters to affected facilities outlining the Department's plans on September 16, 2008.

The Department plans to form an implementation workgroup in late winter or early spring of 2009 to determine whether the Department must develop section 112(j) requirements for boilers and process heaters, and, if so, when to begin developing those standards. Proposed rule changes to implement section 112(j) may be initiated as a result of the workgroup activities. If EPA fails to re-promulgate final MACT standards for boilers-process heaters by the applicable deadlines, the Department may be required to finalize the state's 112(j) MACT standards prior to EPA's re-promulgation.

Since only three brick and structural clay products manufacturing facilities exist in the state, the Department will be working with these facilities individually to develop the 112(j) requirements, as needed.

During the rulemaking process to remove the vacated federal regulations from state air quality rules, the Department will continue to closely monitor EPA and federal court actions, and, if needed, will alter its proposed rulemaking and implementation strategies.

If the Commission approves this Notice of Intended Action, a public hearing will be held on Monday, January 5, 2009, at 1 p.m. at the Department's Air Quality Bureau offices. The public comment period for the proposed rules will close on Tuesday, January 6, 2009.

Commissioners asked to keep updated on CAIR and CAMR.

Motion was made by Shearon Elderkin to approve the NOIA as presented. Seconded by Charlotte Hubbell. Motion carried unanimously.

APPROVED AS PRESENTED

REVISIONS TO RECENTLY ADOPTED UNDERGROUND STORAGE TANK RULES PERTAINING TO ASSESSMENT OF RISK TO PUBLIC WATER SUPPLY WELLS AND ENTER INTO A 28E AGREEMENT WITH THE IOWA UST FUND BOARD TO FUND A STUDY

Elaine Douskey with the Department of Natural Resources presented the following item.

The Department proposes to amend Chapter 135, risk based corrective action procedures, and we seek EPC approval of a 28E agreement between the UST Fund Board and the DNR to fund a study of UST petroleum releases and their potential to impact public water supply wells.

Background

Approximately two years ago, the DNR and other interested stakeholders began a process to review a computer model used to predict the areal extent of plumes from leaking underground storage tanks. The model was 10 years old and in many cases largely overestimated the areal extent of plumes when compared to actual plumes that had been measured in our 10 years of working with the model. The DNR worked with the UST Fund, Dr. LaDon Jones from Iowa State University, groundwater professionals, and the private insurance sector to develop this model. In order to replace the "old" model with the new model which is more reflective of measured plumes, a rulemaking package was proposed.

This rulemaking package was proposed to the EPC in November of 2007. At that time, representatives of the public water supply sector expressed concern that the new model may not provide adequate protection of their source water areas. EPC directed staff to go back and work with water supplies and the other stakeholders to make sure their concerns were taken into account. In January of 2008, a revised rule package was proposed to the EPC which was sent out for public comment. At the March meeting of the Administrative Rules Review Committee (ARRC), the regulated community expressed opposition to parts of the rule dealing with special public water supply well assessment procedures, and subsequently the ARRC directed the DNR to undertake a regulatory analysis of the rules and continue conversations with the stakeholders. For the next two months, regular meetings were held and a regulatory analysis of the rules was completed. We met again with ARRC in May where we identified some changes that could be made to the rules, but that these changes needed to go back to the EPC for action.

In June, 2008 the Commission adopted a package of amendments to the "risk based corrective action" (RBCA) rules in chapter 567 IAC 135. These rules were to become effective on August 6, 2008. At its July meeting, the ARRC expressed concern about the rules for some of the same reasons expressed in March and exercised its authority to delay the effective date of the rules for 70 days. The Committee encouraged opposing stakeholders and the DNR to attempt to reach resolution. (See Iowa Code section 17A.4). The delay of the effective date was set to expire on October 16, 2008. At the October 14, 2008 ARRC meeting, after hearing that a consensus among stakeholders had been reached on an alternative approach to the special well assessment procedures, the DNR and stakeholders recommended and the Committee approved a session delay on those parts of the rule that were objectionable.

Alternative Resolution

1. The DNR and stakeholder groups have reached a tentative agreement to resolve the controversial aspects of the rule package.¹ The resolution requires a decision by the EPC to a) initiate further rulemaking to essentially rescind selected parts of the adopted rules, and b) approve a funding agreement between the Iowa Comprehensive Petroleum Underground Storage Tank Board (UST Fund) and the DNR.
2. The controversial aspect of the rule package is a provision that establishes a special risk evaluation process for public water supply wells (pws) that are located outside of the predicted area of groundwater contamination as determined by a two-dimensional model. The provision assigns responsibility for the initial pws risk evaluation to owners and operators of LUST sites and their groundwater professional. Under pre-existing rules, UST owners and operators had no responsibility to assess any wells located outside the modeled or predicted area of groundwater migration. The concern from a technical point of view has been that the model does not take into account the pumping influence of wells and vertical movement of groundwater that could extend to wells outside the modeled plume and that the rules are simply ignoring potential risk to these critical resources.
3. Funding agencies and some of the regulated community felt that the rules placed an excessive and uncertain financial burden on them to assess risk to wells over a large area where there could be multiple contributing sources and that the assessment could result in excessive costs without sufficient documentation or justification that there was a need for this new procedure.

¹ The non-controversial parts of the rule package related to the substitution of a "recalibrated" groundwater transport model for the existing model which was thought to be unnecessarily overpredictive, i.e. it assumed contamination in groundwater moved horizontally much further than it actually does. A technical advisory group had studied the groundwater model that was adopted in 1996 and modified it based on comparison to actual groundwater movement data accumulated over the past 10 years or more. The "recalibrated" model is expected to in some cases significantly reduce or shrink the predicted area of movement and thereby reduce the predicted impact on "receptors". The rule package also had some revisions to implement current practice of conducting "corrective action meetings" with responsible owners and operators, funding sources and other interested parties to jointly develop corrective action plans to address contaminated sites. It had some non-controversial provisions regarding notice to public water supplies when releases occur within 2,500 feet of their wells and also a requirement to sample all wells within 100 feet of an actual groundwater plume. With resolution of the pws risk assessment provisions, all parties appear to support maintenance of these adopted amendments.

4. The DNR negotiated a resolution with representatives from the two primary stakeholder groups. One group is represented by the Petroleum Marketers Management Insurance Company (PMMIC) which insures about 70% of UST sites in Iowa and the UST Fund which is a state agency that provides financial assistance for "old" UST releases that essentially occurred prior to October 1990. Representatives of the Iowa Association of Municipal Utilities, the Iowa Rural Water Association, and the Iowa Association of Water Agencies have represented the other major stakeholder interests.
5. The DNR and these groups have prepared a proposal which would require the Commission to initiate a rulemaking to revise the adopted rules by removing the provisions that allocated responsibility for conducting a pwsu risk assessment to owners and operators and the DNR. That provision also granted authority to the DNR to require owners and operators to take further corrective action if sufficient proof of risk was established through this process. The negotiated proposal would provide that the DNR and the Iowa UST Fund enter into a 28E agreement in which the DNR and the UST Fund would jointly conduct a "study" of potential risk to pwsus that are located outside the modeled groundwater plume.
6. Under the basic terms of the 28E agreement (attached), the UST Fund would provide funding for no less than 125 sites to allow the DNR and the UST Fund to jointly study various types of risk assessment techniques, including "desktop" analyses, limited field work to determine the potential pumping influence of wells outside the modeled plume, recalibration of the existing two-dimensional model to more accurately identify risk to pumping wells and generally study the frequency and effects of impacts to wells outside the modeled plume. After the study is completed, and depending on the findings, the DNR would then have the option to initiate further rulemaking to propose a risk assessment procedure for wells located outside the modeled plume.
7. Under the terms of the 28E, if unacceptable risk to a pwsu is established, the UST Fund will provide funding to undertake further corrective action under two basic scenarios. One is where the DNR has classified the site as "no further action" (NFA) and issued a certificate but risk is subsequently established under this study such that the site must be "reopened". The other situation is where a NFA certificate has not been issued at the time a risk to a pwsu is established. In this case, the UST Fund would provide financial assistance under their existing remedial benefits program to claimants that are otherwise "fund eligible" (basically any sites with pre-1990 releases). But any site not fund eligible would not be granted funding to take necessary further action.
8. To address the concern that risk to a pwsu could be established under the study but funding for corrective action under this agreement may not be available in some cases, the DNR proposes an amendment to chapter 135 (per this notice) that would need to accompany the 28E agreement. The amendment gives the DNR discretion or "reservation authority" to require owners and operators to undertake further corrective action in the event that unacceptable risk to a pwsu is established during the study but funding under the 28E is insufficient or unavailable to undertake these actions. Without this provision, the 28E by its terms could identify a legitimate risk to a pwsu but provide no funding in certain cases. Without a rule amendment, the DNR may not have a legal basis to impose the regulatory obligations on the responsible owner since the well falls outside the modeled plume and under existing rules owners and operators may not have regulatory responsibility for

wells outside the modeled plume. The stakeholders and the DNR are in consensus with the reservation language of the proposed rule.

Susan Heathcote had a comment on the following language of the rule:

ITEM 2. Amend subrule 135.8(1) by adopting new paragraph "e" as follows:

e. Pathway re-evaluation. Prior to issuance of a no further action certificate in accordance with 135.12(10) and Iowa Code section 455B.474(1)(h)(3), if it is determined that the conditions for an individual pathway that has been classified as "no action required" no longer exist, or it is determined that the site presents an unreasonable risk to a public water supply well **and** the model used to obtain the pathway clearance under predicts the actual contaminant plume, the individual pathway shall be further assessed consistent with the risk based corrective action provisions in 135.8-12.

Commissioner Heathcote said that the language in item 2 should be changed from AND to OR. "I believe the OR would make it clear that you would have to look at those sites and potentially do further assessments where the model is not predicting."

DNR Staff asked for some time to review the language change.

Wayne Gieselman said that the language change is fine.

CDI/WINNEBAGO – APPEAL OF PROPOSED DECISION

Participants in attendance:

Anne Preziosi, Attorney representing the Department of Natural Resources

Tara Hall, Attorney representing Winnebago

Dave Nagle representing CDI

Julie Berger, Attorney General's office

Glenn Carper, DNR Inspector

Dave Phelps, DNR Air Quality

Catharine Fitzsimmons, DNR Air Quality Bureau Chief

Anne Preziosi presented the following information on behalf of DNR:

On several separate occasions, CDI and Winnebago appealed DNR's determinations that the CDI and Winnebago facilities constitute one major stationary source at their locations in both Charles City and Forest City, Iowa. These appeals have been before the EPC once already, on appeal of the administrative law judge's decision to grant summary judgment. That decision was ultimately overturned by the Hancock County District Court, who remanded this matter back for a full contested case hearing.

On May 28 and 29, 2008, a contested case hearing was held before an administrative law judge in the consolidated appeals. A Proposed Decision was issued on August 11, 2008, upholding DNR's determinations that the CDI and Winnebago facilities constitute one major stationary source in each city. On September 11, 2008, a joint appeal of the Proposed Decision was filed by CDI and Winnebago. The parties have filed briefs to the EPC. Briefs were due October 8, 2008. Reply Briefs were due October 20, 2008. The Attorney General's Office will provide counsel to the EPC during this hearing.

The record in this case includes the notices of appeal, pleadings, motions, rulings, and filings listed in Attachment "A" to the Proposed Decision, including the record on appeal before the EPC and the District Court; the parties' "Stipulated Facts" filed on May 28, 2008; the exhibits listed in Attachment "B" to the Proposed Decision; the hearing transcript; and the Post Hearing and Reply Briefs of the parties. A copy of the Proposed Decision, including Attachments "A" and "B", is attached. As the record is voluminous, each of the EPC Commissioners were provided with an electronic version of the scanned record.

This case is about:

- two facilities that work together to manufacture Winnebago motorhomes.
- whether those two facilities should be counted together to figure out which air pollution laws apply.
- Whether those two facilities should be subject to greater scrutiny because they are one stationary source of air pollution.

Types of preconstruction review permits:

Major source permitting = PSD permitting (Prevention of Significant Deterioration of Air Quality)

- More emissions
- More scrutiny under the law

Minor source permitting

- Less emissions
- Less scrutiny under the law

There are four main goals of PSD permitting...

1. to protect public health and welfare
2. to preserve, protect and enhance the air quality in national parks, wilderness areas, and national monuments
3. to ensure that economic growth will occur in a manner consistent with the preservation of existing clean air resources
4. to allow for a public opportunity to comment on such permits

There are three criteria used to determine what is a major stationary source:

1. same industrial grouping (same SIC code)
2. whether the pollutant-emitting activities are in contiguous or adjacent properties
3. whether the pollutant-emitting activities are under common control

Common control is the factor at issue in this contested case.

Why is the status of being a major stationary source important for purposes of air quality preconstruction permitting?

Once a facility is considered a major stationary source, they have a lower threshold for any expansion they want to do.

What is common control:

- Not defined in federal or state law
- Difficult factual determination
- Power of one business entity to affect the construction decisions and pollution-control decisions of another business entity
- Case-by-case basis decision
- Use of EPA guidance documents and EPA preambles
- Securities and Exchange Commission definition of control

Control can be a difficult factual determination, involving the power of one business entity to affect the construction decisions or pollution control decisions of another business entity.

Control means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or organization of association whether through the ownership of voting shares, contract, or otherwise.

Effect on CDI and Winnebago of stationary source status:

Q. Please explain the practical significance of DNR's determination that CDI and Winnebago should be regarded as one stationary source.

A. That...CDI would have a lower threshold of emissions...if they were going in...by themselves, they would be allowed up to the 250-ton threshold..."

"...if they're considered a major stationary source as part of Winnebago, they would be limited to...40 tons of volatile organic compounds without going through PSD...If they would go over 40 tons...they'd have to get a PSD permit."

From the testimony of Chris Roling.

Q. Why did CDI submit a PSD preconstruction permit application?

A. Since they were considered to be modification to a single stationary source [Winnebago] and the emissions were over the 40-ton threshold, they would have had to submit a PSD application...In their application they were requesting 80 tons of emissions."

From the testimony of Dave Phelps.

Evidence of Common Control – Exhibit DNR 23 (Forest City)

“Eggs in one Basket” – July 6, 2001 letter CDI to Winnebago

“As discussed in our June 2007, 2001 meeting, we committed to advising Winnebago Industries of our intentions to build a paint facility in Forest City, IA to exclusively serve Winnebago’s full paint production.”

“We are putting all our eggs in the Winnebago basket and it will be important for us to clearly understand your expectations.”

May 12, 2002 letter CDI to Winnebago

“John and I wanted to update you on the progress of the Air Permit...CDI will have to install control technologies that help reduce emissions...[A]t this point before we get back to DNR, there are some decisions to be made with CDI’s management as well as Winnebago...[W]e are looking for advice, help and direction.”

Exhibit DNR – 14, CDI’s Forest City PSD Permit Application
June 2002

“The proposed CDI facility will conduct finish painting of the exterior of recreational vehicles manufactured at the nearby Winnebago Industries facility.”

“The new CDI facility is necessary to accommodate changing market requirements affecting nearby Winnebago Industries.”

Exhibit DNR – 16, CDI’s PSD Permit Application to Expand Forest City Facility
May 2003

“CDI, LLC plans to expand their coating facility in Forest City, Iowa. The facility conducts contract painting for a nearby Winnebago Industries recreational vehicle manufacturing facility.”

“CDI began operation of the facility in 2002 under a PSD construction permit issued by IDNR...The proposed expansion of the CDI facility is necessary to accommodate increased demand at the Winnebago Industries.”

Exhibit DNR – 17, CDI’s Revised PSD Permit Application to Expand Forest City Facility
December 2003

“The proposed expansion of the CDI facility is necessary to accommodate increased demand at the Winnebago Industries.”

Exhibit DNR – 23 (Charles City)

“Eggs in One Basket”

February 7, 2003 letter from CDI to Winnebago

“...we do fully anticipate, and expect for Winnebago to be our only customer in Charles City...We also feel that if you are going to have an “all eggs in one basket” business model, Winnebago is one of the few companies, in any industry, you would want to partner with.”

Evidence of Common Control

Exhibit DNR – 19 (Forest City Contract)

Exhibit DNR – 20 (Charles City Contract)

10 contract provisions indicate common control: (I have listed 6)

- CDI has the exclusive right to paint Winnebago's products
- Winnebago and CDI have agreed that "[t]he intent of the parties is to develop a long-term relationship."
- The contracts say that "[t]he parties understand that CDI's investment in the project is with the sole intent of expansion of business by providing services to Winnebago."
- CDI agreed to transfer its real estate lease and equipment to Winnebago if the contract should terminate
- CDI agreed to "install a number of finish items and exterior components to complete the assembly of the vehicle, as part of the assembly line process of producing Winnebago motorhomes."
- Winnebago agreed to guarantee enough work "to provide reasonable assurance of sufficient volume to maintain profitable operations" at CDI or to pay CDI a set amount per period

Exhibit DNR-2

November 2, 2004 – Inspection

- Glen Carper with the DNR conducted the inspection and met with CDI plant manager Dave Nagle who admitted CDI violated permit limits
- CDI plant manager Dave Nagle admitted CDI installed and operated equipment without first obtaining permits
- Dave Nagle said CDI "could not wait for the permits to be issued"
- He said Winnebago was providing motor homes to him and he had to paint them
- He said that if he stopped painting motor homes for Winnebago they (Winnebago) would have to lay off 800 people
- Mr. Nagle admitted he knew he could get in trouble and even go to jail for violating the permit conditions and building without a permit, but he felt he had no choice.

EPA Support for DNR's position

EPA has supported DNR's position in writing on three different occasions:

- July 6, 2004 (Exhibit DNR-32)
- August 27, 2004 (Exhibit DNR-33)
- January 13, 2005 (Exhibit DNR-35)

August 27, 2004 – EPA letter

"...we believe it is reasonable to conclude that CDI and Winnebago should continue to be treated as one stationary source. Therefore, we agree with your staff's conclusion that CDI/Winnebago is a single source...Based on these same facts, we believe that other regions would also conclude the same."

The Proposed Decision

The preponderance of the evidence in the record established that Winnebago possesses, indirectly, the power to control CDI's construction and pollution control decisions at its locations in Forest City and Charles City.

The DNR's asks you today to affirm the proposed decision as it is written.

Tara Hall, representing Winnebago Industries presented the following information on behalf of Winnebago:

Winnebago is in the business of manufacturing and selling recreational vehicles. (RVs) CDI is a separate entity that is in the business of custom painting RVs and other work. These are separate and distinct entities. There is no common ownership or shared board of directors.

At the outset of CDIs entrance into the business market, CDI applied for separate permits and the DNR determined that it would be a single stationary source. CDI appealed this decision as did Winnebago once it learned of this. The DNR then asked the Administrative Law Judge to determine as a matter of law that these were in fact a single stationary source. The motion for summary judgment was granted and subsequently appealed by Winnebago and CDI. That decision then went before the commission at that time, the Commission did not reach a majority to affirm or reverse that decision, and therefore went back to the Department as final agency action. The district court determined that the summary judgment had been granted in error and remanded the case to determine whether there was common control such that Winnebago controlled the pollution control decisions of CDI. The district court found fewer facts and that an evidence hearing needed to be held, which was held in May of this year. The ALJ found that they were a single stationary source. Winnebago disagrees with the incurrence's and the final conclusion that was reached. Winnebago believes that the ALJ failed to circle back around to determine the central issue of whether Winnebago does control the pollution decisions of CDI.

We submit that Winnebago did not control the pollution control decisions of CDI. With regards to the burden of proof, the Commission has all the power that the ALJ has, therefore the Commission can reverse the decision of the ALJ, if the DNR fails to prove common control. We submit that the substantial evidence standard is not the correct standard, as that would apply to a judicial review standard.

As the district court set forth, which is the law of the case by case, the FCC standard is the correct standard which guides the common control issue. That FCC regulation states control is the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or organization or association whether through the ownership of voting shares, contract or otherwise.

Throughout this analysis by the DNR they have looked to other factors such as EPA guidance documents are not the law of the case. Those can be examined and looked at but they are not to be substituted for the power of control mandated by the FCC. The district court also indicated that the service agreements between CDI and Winnebago do not provide Winnebago the power to direct management policy or equipment at CDI. Throughout the DNR's analysis, they have

also looked to support the dependency test. The Iowa Authority indicates that looking to an unpublished administrative rule amounts to illegal rulemaking. Some of the EPA's decisions and guidance also cited by the DNR are distinguishable because CDI is not 100% dedicated to providing services to Winnebago. There are other services that CDI provides outside of Winnebago.

Under the FCC test, you must show that a company can force a company to do things and do them in a specific manner. Winnebago states that there is no evidence that Winnebago was involved with CDI's decision making regarding pollution control. If the service agreements alone were enough, which is what the district court said, then the DNR has no other evidence to support common control.

With regards to the analysis that has been conducted, the DNR witnesses have been forthright and admitted directly that they did not even consider common control coming out of the chute.

In pages 151 and 155 of the transcript submitted to the Commission, that goes through a variety of factors on the behalf of Winnebago that shows there is no common control.

The ALJ has no witnesses have testified that Winnebago controls the pollution decisions of CDI. CDI has made their own decisions. There is no evidence that Winnebago controls the decisions of CDI. CDI has made decisions regarding paint contrary to Winnebago's recommendation. For example, if there is an increase in production CDI will choose how they want to handle the increase. They choose if they want to increase shifts, refuse to accept vehicles, pollution decisions, etc. Historically, Winnebago is very conservative when it comes to pollution control and environmental compliance. It does not appear that Winnebago would direct or encourage CDI to violate any permits or laws. The testimony also reveals that the decision to violate permits were made without consulting Winnebago. Therefore, shedding additional light that Winnebago is not directing pollution control decisions of CDI. I believe the ALJ found no evidence of direct control. All companies consider the impact of their decisions to the businesses to which they do business with but that doesn't mean the decision making control has been transferred.

The DNR has not gone back to reconsider whether or not there is sufficient evidence to support the common control. DNR witnesses admitted that they did not go back and re-visit the analysis as directed by the District Court.

If Winnebago cannot control the pollution control decisions then it should not be held responsible for the pollution decisions that CDI makes. Winnebago, like many entities has the ability to make suggestions or recommendation, but that does not equal common control under the FCC test.

At this time, Winnebago is requesting that the Commission vacate and reverse the proposed decision of the Administrative Law Judge and declare that neither CDI nor Winnebago has the ability to control the pollution control decisions of the other and declare that they are not under title control and declare that they do not consider a single stationary source for legal purposes

and order the DNR to rescind and revoke the permits issued to CDI and Winnebago and re-issue new permits as requested.

Anne Preziosi said with regard to Ms. Hall's statement about the service agreements that the ALJ and DNR agreed that the service agreements should be evaluated and counted as part of the proceedings. The DNR's position is that this was not improper. Further, she stated that there is Iowa case law to support the DNR's use EPA guidance. Also, there was a statement made that CDI provides services to others besides Winnebago. However, CDI provides 98% of its business to Winnebago. Ms. Hall also stated that DNR witnesses said they did not consider common control, and that is incorrect. DNR considered common control at the very beginning. DNR's position is that the FCC definition, first mentioned by EPA in September 1980, was followed by EPA guidance documents, which were meant to interpret it. DNR did take an initial position based on the information that was given at the time. We have constantly re-evaluated our position based on the new information we received.

Commissioners went around the room and asked questions and then debated their thoughts and ideas regarding common control.

Motion was made by Charlotte Hubbell to affirm the Administrative Law Judge's decision. Seconded by Susan Heathcote. Roll call vote went as follows: David Petty – nay; Susan Heathcote – aye; Marty Stimson – nay; Paul Johnson – aye; Shearon Elderkin – aye; Charlotte Hubbell – aye; Henry Marquard – nay. Motion failed.

The Department's decision to affirm the Administrative Law Judge's decision stands based on a no action vote of the Commission.

[For a complete audio recording, please contact the Director's office at the Department of Natural Resources.]

AFFIRMED

REFERRAL TO THE ATTORNEY GENERAL – COLLEEN WEBER

Jon Tack of the Legal Services Bureau presented the following item.

Colleen Weber (Mitchell County) – Air Quality / Solid Waste

Colleen Weber owns a property located in Osage, Iowa. Ms. Weber has repeatedly engaged in illegal open dumping and open burning at the site. On August 28, 2008, DNR Environmental Specialist visited the Weber property. No remedial action had been taken as of that date and some additional dumping of solid waste was observed to have occurred.

The Director requests the referral of the following to the Attorney General for appropriate legal action. Litigation reports have been provided to the commissioners and are confidential pursuant

to Iowa Code section 22.7(4). The parties have been informed of this action and may appear to discuss this matter. If the Commission needs to discuss strategy with counsel on any matter where the disclosure of matters discussed would be likely to prejudice or disadvantage its position in litigation, the Commission may go into closed session pursuant to Iowa Code section 21.5(1)(c).

Motion was made by Shearon Elderkin to refer Colleen Weber to the Attorney General's office. Seconded by Paul Johnson. Motion carried unanimously.

REFERRED

CONTINUED...REVISIONS TO RECENTLY ADOPTED UNDERGROUND STORAGE TANK RULES PERTAINING TO ASSESSMENT OF RISK TO PUBLIC WATER SUPPLY WELLS AND ENTER INTO A 28E AGREEMENT WITH THE IOWA UST FUND BOARD TO FUND A STUDY

Wayne Gieselman clarified the commissions questions.

The DNR determines the unreasonable risk and has the responsibility to identify sites.
(28E Agreement, Item 2)

Susan Heathcote suggested that we change the 28E agreement so that it's jointly administrated between the DNR and UST Board.

III. ADMINISTRATION

This Agreement shall be jointly administered by the Board and its Administrator and the Director of the DNR or the Director's designee. All administrative decisions concerning this Agreement shall be undertaken pursuant to the terms outlined herein.

Motion was made by Susan Heathcote to approve the language revisions. Seconded by Charlotte Hubbell. Motion carried unanimously.

Commissioners asked questions and stated their concerns with the financial staffing issue, the UST Boards role with the DNR and determining what unreasonable risk is.

Motion was made by Shearon Elderkin to approve the underground storage tank rules as amended. Seconded by Marty Stimson. Motion carried unanimously.

APPROVED AS AMENDED

28E AGREEMENT BETWEEN THE IOWA UNDERGROUND STORAGE TANK BOARD AND THE IOWA DEPARTMENT OF NATURAL RESOURCES FOR FUNDING THE

DEPARTMENT'S UNDERGROUND STORAGE TANK SECTION FOR FISCAL YEAR 2009

Wayne Gieselman, Administrator of the Environmental Protection Division presented the following item.

The Department is requesting approval for entering into a 28E agreement with the UST Fund Board that will provide a portion of the funding needed for the management and operation of the Department's UST Section. Receipt of the funding is contingent upon DNR meeting quarterly milestones in four areas of responsibility.

The source of funding for this agreement is the state's tank tag fees. An owner or operator of an underground tank shall pay an annual storage tank management fee of sixty-five dollars for each tank over one thousand one hundred gallons capacity. DNR collects the fees and issues the tags. Twenty-three percent of the fees collected are deposited in DNR's storage tank management account of the groundwater protection fund. Seventy-seven percent of the fees are transferred and deposited in the comprehensive petroleum underground storage tank fund which is managed by the UST Fund Board. A total of \$500,000 to \$525,000 is collected on an annual basis. In FY'08 \$385,000 was transferred to the UST Fund Board while DNR retained \$115,000.

Funding for DNR's tank programs particularly the Underground Storage Tank Program (UST) remains problematic. In order to have a balanced budget DNR has relied upon the portion of the tank tag fees that are transferred to the UST Fund Board. The mechanism for the reverse transfer has been a 28E Agreement. For the current fiscal year DNR has agreed to carry out and complete four areas of responsibility. The UST Fund Board agrees to compensate the Department in an amount of \$385,000. A summary of DNR's responsibilities is as follows:

1. Perform an assessment of low risk Leaking Underground Storage Tank (LUST) sites for which monitoring has been conducted for five or more years. The outcome is to develop criteria and a procedure for determining which sites are eligible for closure.
2. Perform research and conduct advisory group meetings for determining the impacts of petroleum on plastic water supply lines' integrity.
3. Conduct meetings and develop a plan for evaluating other Risk Based Corrective Action (RBCA) rules including but not limited to: soil gas methodology and guidance; sewers as receptors for contaminants from LUST sites; surface water restrictions; and, capturing the effect of time on historical releases.
4. UST Section staff will meet on a quarterly basis with the appropriate DNR Field Office Staff to review accomplishments of previous quarter, set priorities for the next quarter, and collaborate on enforcement strategies.

The approval by the UST Fund Board to enter into this agreement is contingent upon EPC's approval of the two other 28E Agreements that are on today's agenda. Since we are already 4 months into the '09 Fiscal Year it is imperative that these matters be resolved.

Susan Heathcote encouraged the Department to pursue legislation for the funds to come directly back to the Department.

Motion was made by Marty Stimson to approve the 28E agreement as presented. Seconded by Susan Heathcote. Motion carried unanimously.

APPROVED AS PRESENTED

INTER-GOVERNMENTAL AGREEMENT (28E) BETWEEN THE IOWA DEPARTMENT OF NATURAL RESOURCES AND THE IOWA COMPREHENSIVE PETROLEUM UNDERGROUND STORAGE TANK FUND BOARD TO PROVIDE FUNDING FOR ASSESSMENT AND CORRECTIVE ACTION AT LUST SITES WHERE A NO FURTHER ACTION CERTIFICATE HAS BEEN ISSUED

Wayne Gieselman, Administrator of the Environmental Services Division presented the following item.

Commission approval is requested for the Department of Natural Resources (DNR) to enter into an agreement with the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board (UST Fund), whereby the UST Fund finances assessment and corrective action of newly identified public health and safety risks associated with historical LUST sites that have been previously 'closed'.

Background:

Iowa Code section 455G.9 specifies conditions on uses for the state's UST remedial benefits account. The authority to enter into this agreement is provided under 455G.9(1)(k) (2007) which states "Pursuant to an agreement between the board and the department of natural resources, assessment and corrective action arising out of releases at sites for which a no further action certificate has been issued pursuant to section 455B.474, when the department determines that an unreasonable risk to public health and safety may still exist. At a minimum, the agreement shall address eligible costs, contracting for services, and conditions under which sites may be reevaluated." The DNR and UST Fund have negotiated terms and conditions regarding eligible sites, scope of work, financing, and termination criteria as indicated in the attached agreement.

The impetus behind the statute change in 2007 was to provide a means to fund necessary assessment and corrective actions to alleviate newly discovered public health and safety risks that are tied to 'old' petroleum releases – specifically, LUST sites which had already been assessed, closed and issued a No Further Action certification. In part, the statute change was made with the intension of strengthening the finality of an NFA certificate for LUST site responsible parties. It was supported by the petroleum marketing industry because the belief was this agreement would take management and funding obligations for these new risk situations out of the hands of the LUST site responsible parties (RP), that it would decrease their liability for old releases (which had been properly assessed and closed per regulations in place at the time),

and improve value and marketability of their properties. DNR also supported the statute change because it creates an expeditious means for funding corrective action for documented public health risks (i.e., emergency conditions) regardless of the financial capability /status of the LUST site RP, as well as provides a mechanism for addressing and preventing new potential risks arising out of newly discovered conditions (for example, finding a new 'pocket' of contamination or identifying a previously unreported receptor (well, basement)).

The Process:

The DNR has developed guidelines for how to determine when reopening a closed LUST is warranted. Upon examination of the newly discovered conditions, readily available site information, characteristics of the former plume and investigation, DNR staff will make a determination of whether an unreasonable risk is present or likely to be present such that funding is needed for further assessment and/or corrective action. The DNR and UST Fund will jointly work with groundwater professional to address the risk conditions.

Sections V of the agreement identifies which 'closed' LUST site are eligible for assessment and corrective action funding; not all sites will be eligible for funding (e.g., new releases occurring after the NFA certificate was issued). Further, the DNR can make a case to the UST Fund Board and request approval for those sites that fall outside of the eligibility criteria. Should the DNR determine an unreasonable risk is present, but the UST Fund Board determines the site does not qualify for funding, DNR has authority to require the LUST RP to conduct the necessary work [455B.474(1)(h)(3)]. Section VI specifies the funding limitations and eligible and ineligible assessment and corrective action costs.

Motion was made by Shearon Elderkin to approve the inter-governmental 28E agreement as presented. Seconded by Marty Stimson. Motion carried unanimously.

David Petty was absent from the room during the three UST related votes.

APPROVED AS PRESENTED

CONTRACT – USGS – COOPERATIVE MONITORING FFY09

Mary Skopec, geologist in the Watershed Monitoring and Assessment Section presented the following item.

The Department requests Commission approval of a contract in the amount of \$547,250 with the United States Geological Survey for stream gauging, flood prediction, groundwater level measurements, and stream water quality monitoring at large rivers.

The purpose of this agreement is:

Load Exports of Major Iowa Rivers Report or the "Big Rivers" project collects water quality measurements on 10 major tributaries from Iowa. Consistent, representative water-quality data from the major rivers draining Iowa have been collected since 2004. With five years of the study completed, it is now time to document quantification of loads of nitrogen, phosphorus, sediment, and pesticides that are transported to the Missouri and Mississippi Rivers. A secondary purpose of the report is to determine if changing land-use and agricultural practices result in subsequent changes in the water quality in major rivers in Iowa. This knowledge will assist in the development of strategies to limit human impacts on the rivers and to evaluate the success (or failure) of these strategies once implemented.

PRMS Flood Model Comparison Iowa had major flooding that occurred across the state in 1993, and in 2008 there has been a reoccurrence of major flooding across the state. In eastern Iowa, the Cedar River USGS stream-gauging station at Cedar Rapids (05464500) had all time record streamflows and gage heights. In 1993, the Cedar River hit a peak flow of 71,000 cubic feet per second (cfs), and a streamgage height of 19.27 feet (ft), in comparison to 2008, streamflow was 150,000 cfs, and 31.10 ft. The 2008 flood on the Cedar River was the largest historical flood of record at Cedar Rapids. The Precipitation Runoff Modeling System (PRMS) will be used to develop models of both major flood events along the Cedar River (Markstrom and others, 2008). The objective of the modeling is to compare and understand the Cedar River floods of 1993 and 2008; the comparison will include similarities and differences of meteorologic, hydrologic, landform, and land use conditions leading up to each event.

Water Quality Modeling (SPARROW) The project includes a long term goal to develop the ability to estimate stream water quality along any stream at any point. The estimation methods need to include the ability to change watershed and hydrologic characteristics so as to simulate what water quality changes would likely occur if the watershed characteristics were to change (for example if retention areas were constructed in the watershed or impervious area was to increase). The Cedar River basin will be modeled using the water-quality model: Soil & Water Assessment Tool (SWAT) (Winchell and others, 2007). The primary objective is to construct and calibrate a water-quality model for the Cedar River basin, and develop methods within SWAT to estimate water-quality at any point along any stream in the Cedar River Basin. The estimates of water-quality will then be compared to observation data collected. A measure of accuracy will be developed between the model and observed data sets.

Streamflow Estimation Models Recent years have seen the emergence of more sophisticated and accurate approaches to streamflow estimation through the use of statistical methods. These methods are relatively new and are in need of more research to validate their results. Three statistical based methods will be examined for this study. All three of these methods will make use of the existing streamgage network in Iowa and a 50-mile buffer in the surrounding states to compute daily flow at ungaged sites in ungaged watersheds. Current active gage stations will act as index gages to the ungaged locations. The State will be divided into regions of similar hydrologic characteristics to ensure that flow is not computed from areas that are not hydrologically related to the unknown site, similar to the technique for developing regions in Eash, 2001. To test the accuracy and compute an error for each of these methods, known gage locations will act as unknown sites and estimated hydrographs will be created. The estimated

hydrographs will be compared with the observed hydrographs, and thus an estimate of error will be calculated for each method.

Water Quality Monitoring Data Collection Consistent, representative water-quality data from the major tributaries will allow the amount of nitrogen, phosphorus, and pesticides that are transported to the Missouri and Mississippi Rivers by ten major rivers draining Iowa to be quantified. A secondary purpose of the study is to collect data for sufficient amount of time to determine if land-use changes and agricultural practices are changing the water quality in major rivers in Iowa. Constituents to be analyzed include field parameters (temperature, conductance, dissolved oxygen, pH, discharge), major ions (alkalinity, silica, chloride, sulfate), nutrients, algal pigments (chlorophyll a, pheophyton a), pesticides, sediment (suspended sediment, turbidity), and bacteria (E. coli, total coliforms). Real-time water quality monitors will be installed and maintained at two streams. Real-time parameters include nitrate, temperature, conductance, and turbidity.

Surface-water Flow Network A network of real-time streamgages strategically located across the state is a critical component for many projects (flood prediction, water quality modeling, NPDES permitting). Data from these streamgages will be used to calibrate models and create statistical equations for computing streamflow at ungaged locations. Since these calculations will be based on the streamflow values, the data needs to be of the highest possible quality with minimal error. The methods used to measure and compute stage and discharge values will be quality assured using nationally accepted protocols that have been extensively researched (Rantz, 1982). Discharge measurements will be routinely performed at these sites during a variety of flow conditions to calibrate and verify stage-discharge relationships.

Ground-water Levels A ground-water climate response network has been established for nine climatological districts throughout Iowa to monitor ground-water response to climate changes. The hydrologic data will support PRMS and SWAT modeling by providing data on base flow, soil-zone reservoirs, subsurface recharge, and ground-water recharge, interflow or subsurface flow across the nine climatological districts. These nine wells will be equipped with telemetry that transmits a reading of water level to a data relay office by satellite. The data will typically be updated every four hours for Web accessible viewing. These data constitute real-time hydrologic data and will be reviewed or edited for publication. Continual collection of data at these sites will serve as support to both the PRMS and SWAT modeling by creating a historic record to create initial modeling parameters.

Appendix B: IDNR and USGS Program Proposal for FFY2009

(October 2008 through September 2009)

Cooperative Program	IDNR	USGS	Total
Load Exports of Major Iowa Rivers	\$37,675	\$30,825	\$68,500
PRMS Flood Model Comparison	\$44,200	\$36,180	\$80,380
Water Quality Modeling (SPARROW)	\$39,655	\$32,445	\$72,100
Surface-water Flow Est.	\$20,515	\$16,785	\$37,300
Water Quality Monitoring Data Collection	\$179,190	\$146,610	\$325,800
Stream Gaging Network	\$203,533	\$166,527	\$370,060
Ground-water Levels	\$22,462	\$18,378	\$40,840

Total	\$547,230	\$447,750	\$994,980
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Funding for this contract comes from monies appropriated for the State Water Plan and Water Quality Monitoring Program (Environment First Funding).

There is a deliverable in the contract for a report by the end of the year outlining how well the model performed.

Motion was made by Susan Heathcote to approve the USGS contract as presented. Seconded by Paul Johnson. Motion carried unanimously.

APPROVED AS PRESENTED

IOWA'S DRINKING WATER CAPACITY DEVELOPMENT PROGRAM - 2008 REPORT TO THE GOVERNOR

Charles C. Corell, Chief of the Water Quality Bureau presented the following item.

The Department is submitting the 2008 *Report to the Governor; Iowa's Capacity Development Program* to the Environmental Protection Commission for information purposes.

The Safe Drinking Water Act (SDWA) Amendments of 1996 require the Department to issue a report to the Governor on the state's capacity development program every three years. Capacity development is defined as the technical, financial, and managerial ability to provide safe drinking water to consumers at a reasonable cost for the foreseeable future. This report fulfills the reporting requirement in Iowa three year period ending September 30th, 2008. It was prepared by the Department's Water Supply Engineering Section in the Water Quality Bureau of the Environmental Services Division.

Development of the report was accomplished with the help of stakeholder input. It was provided to the Governor's office and to EPA by the September 30th deadline. Electronic copies were also provided to the stakeholders. The report contains a summary of the program, description of the activities the department has undertaken during the past three years, and ideas for improving the capacity of public water systems in Iowa during the next three years.

Report highlights:

- The stakeholders would like to see IDNR develop a "score card" for water systems based on periodic inspection information to show the relative capacity rankings of water systems throughout the state. They would like to see this information tied to the Great Places initiative to reward systems with high capacity scores.
- The department plans to continue to focus on training water system managers (water board and city council members) to improve long-term planning skills and emphasize the importance of properly operating a public water supply. The department also expects to

work with the Iowa League of Cities to develop financial and water system management training for city clerks during the next three years.

- Stakeholders would like to see a detailed accounting of the sources and uses of funds for the Drinking Water Program on an annual basis.
- The department committed to sponsor meetings twice annually to plan for operator training and to provide a list of the common deficiencies identified during periodic water system inspections as a basis for developing training topics.
- The department will consider doing a statewide water system rate study and using the data to look at innovative financing options for water system improvements.

The electronic report is available on the IDNR's website at:

<http://www.iowadnr.gov/water/viability/index.html>

Copies of the report are also available to the public upon request.

INFORMATIONAL

CONTRACT – WINDSOR SOLUTIONS, INC. – FACILITY APPLICATION REBUILD

Chuck Corell, Water Quality Bureau Chief presented the following item.

Recommendation

The Department requests Commission approval of a contract in the amount of \$165,000 with **Windsor Solutions, Inc.** for rebuilding computer applications related to the Environmental Facilities Database warehouse, also known as “One Stop”. The contract will be from Nov. 17, 2008 through Sept. 30, 2009, with optional renewals up to 6 years.

Funding source

Funding for the contract is 100% **federal** funding from EPA Exchange Network grants.

Background

The Department of Natural Resources (DNR) developed the One Stop data warehouse in 2004 to bring together core environmental information in one place for easy access by DNR staff and the public.

The Facility Explorer application is a web and GIS based tool for searching/displaying environmental facilities in Iowa. Internal users with security also have the ability to edit facility locations using a map based interface, called Facility Maintenance.

Purpose

Goals for rebuilding the Facility Explorer/Maintenance applications include:

- Improve maintainability of application
- Use new mapping functionality provided by ArcGIS Server
- Make the application easier to use
- Add needed search and display functionality
- Add a Site Reconciliation module

Contractor Selection

The Request for Proposal process was handled by the Iowa Department of Administrative Services, and a team of three DNR staff reviewed the proposals according to state guidelines.

This contractor was chosen because they have extensive experience in this area and they developed a very well-thought out proposal that addressed each set of requirements in detail. They had the highest total score of the five proposals submitted.

Their **experience** includes the following.

- Developed a facility information management system for seven other states' environmental agency; including data warehouses and a site reconciliation process.
- Wrote the Facility Identification Template for States (FITS), the Facility Data Standard and the Facility Identification Data Exchange which are the national standards for this data.
- Developed an innovative application for Iowa DNR and three other states to provide environmental facility data and chemical storage data to emergency responders. This application is now being implemented by six other states, and considered by several others.
- Their GIS Specialist has experience with ArcGIS Server, is on the nation Geospatial Task Force for the Exchange Network, and has authored white papers on GIS for the Exchange Network.

Motion was made by Charlotte Hubbell to approve the Windsor Solutions contract as presented. Seconded by Susan Heathcote. Motion carried unanimously.

APPROVED AS PRESENTED

CONTRACT – AQUADRILL - GEOLOGIC DRILLING

Deborah Quade, STATEMAP Coordinator in the Geology and Groundwater Studies presented the following item.

The Department requests Commission approval of a \$44,000 drilling contract with Aquadrill, Inc. of Swisher, IA to conduct geologic coring for the STATEMAP Geologic Mapping Program. Aquadrill Inc. was the sole bidder on the project. The solicitation was posted on the Targeted Small Business website and sent to five known vendors as well posted in a major state-wide newspapers. One Aquadrill Inc. responded and submitted a bid.

Aquadrill, Inc. has provided drilling services for the Iowa Geological Survey (IGS) for the past ten years. They have a long history of providing quality drilling services for surficial and bedrock drilling and have always met or exceeded contractual obligations in past contracts. Drilling for FY08 STATEMAP projects includes surficial drilling in Bremer, Butler, Black Hawk and Scott counties.

Funding for this contract is available from the IGS general fund and the United States Geological Survey (USGS) as part of the 50% match for STATEMAP contracts.

Motion was made by Paul Johnson to approve the contract as presented. Seconded by Susan Heathcote. Motion carried unanimously.

APPROVED AS PRESENTED

MONTHLY REPORTS

Wayne Gieselman, Division Administrator, Environmental Protection Division, presented the following items.

The following monthly reports are enclosed with the agenda for the Commission's information and have been posted on the DNR website under the appropriate meeting month: <http://www.iowadnr.com/epc/index.html>

1. Rulemaking Status Report
2. Variance Report
3. Hazardous Substance/Emergency Response Report
4. Manure Releases Report
5. Enforcement Status Report
6. Administrative Penalty Report
7. Attorney General Referrals Report
8. Contested Case Status Report
9. Waste Water By-passes Report

GENERAL DISCUSSION

Wayne Gieselman mentioned the following items:

- EPA State Director's meeting on December 2-3 at Honey Creek Resort State Park
- There will be two different Flood Recovery Conferences going on December 8th and the IDED will lead conference on the 9th – 10th.
- ReBuild Iowa issued a report last Friday with recommendations on floodplain mapping, LiDAR, mitigation in the future, etc.
- The Department will present a proposed rule for manure on frozen ground in December.

EPC Report to the Legislature

David Petty and Charlotte Hubbell will help to coordinate a draft report for the Commission's review.

Henry Marquard said that he will send Commissioners Petty and Hubbell the format for the report.

Dallas Pork/Lincoln 1 Pork litigation

Henry Marquard said that there has been some development in the Dallas/Lincoln 1 Pork litigation.

Dave Sheridan from the Attorney General's said that Robert Birchfield, represented by Wally Taylor moved to intervene and to set aside the consent degree that was executed on October 14th.

Confinement Feeding Operations – 459.304

Charlotte Hubbell submitted the following comments:

Since the Commission's decision in the Dallas County hog lot appeals case was decided as "other agency action", the scope of review in the district court upon appeal from the hog lot producer should be judged as to whether it was ultra vires (outside the scope of authority granted to the Commission) or unreasonable, arbitrary and capricious. It is not necessary to show that our decision was supported by "substantial evidence". Sheet Metal Contractors v. Commissioner of Insurance, 427 NW 2nd 859 (1988).

Chapter 459.304(2)(b) says the County Board of Supervisors may hold a public hearing to receive public comments regarding a construction application permit for a CAFO. The County Boards may submit to the department comments by the Board and the public...including but not limited to all of the following... Therefore follows a list of four items that the board can consider in deciding whether or not to recommend approval or disapproval to the Department. Interestingly, one of them refers to the "suitability of soils and the hydrology of the site where construction is proposed." Please note that other items not enumerated by the statute can also be considered by the County Board in its recommendation.

After a public hearing the County Board can submit a recommendation to the department of approve or disapprove a permit application (Ch.459.304(3)). The Board must evaluate the application using the master matrix, but the Board's recommendation to the public may be based on the master matrix or may be based on comments received regardless of the results of the master matrix. (Ch. 459.304(3)(b))

If the Board recommends disapproval of the permit, the DNR must conduct an independent evaluation of the application using the master matrix. Was such an independent evaluation made by the DNR in the Dallas County case?

A County Board that has submitted an adopted recommendation to the department may contest the department's decision by requesting a hearing before the Commission. The Commission shall hear the case according to procedures established by rules adopted by the department. (Ch 459.304(8)(b)(2)) Do we have such rules? This law was adopted in 2002. If we do not have such rules, why haven't they been adopted before now? How has the Commission proceeded in the past on hog lots appeals brought before it?

If, as the department and the AG's office seem to argue, the EPC does not have the authority to overturn a hog lot permit issued by the department (unless it is one of the factors enumerated in the statute – separation distances, manure storage design

standards, etc.), upon review of the record as presented by the county, why is the county even allowed to appeal to the Commission? This would seem to be a fruitless action and the county would be better off appealing directly to district court. Surely, if the county board of supervisors is allowed to consider comments from the public in making its decision, we are allowed to review those comments in making our decision.

My argument remains that in the absence of language that tells us what we are limited in reviewing upon appeal, the plaintiff must prove that our actions are ultra vires or arbitrary and capricious. If the County Board makes its own comments or receives public comments in a hearing, then surely we can review them in arriving at our decision. If a river or watershed is impaired, we have the right to consider that in making our determination.

Charlotte Hubbell said that she is trying to establish whether or not the Commission has the authority to review a recommendation on an appeal from a County Board of Supervisors where they recommend denying a permit to a hog lot and what our scope of review should be. I don't believe we are constrained to reviewing only the master matrix.

Susan Heathcote said that the Department's discretionary rule was an attempt to put boundaries on what other issues could be considered. It just hasn't been implemented very well.

Randy Clark went through the Iowa Administrative Code – Chapter 65 dealing with the construction permit application review process, site inspections and complaint investigations. Randy also went through the Iowa Code 459.304 – Construction permit application procedure – County participation – Comments and master matrix.

Discussion continued on about possibly changing the master matrix and introducing legislation dealing with CAFOs.

Richard Leopold suggested that a third party facilitator undertake these meetings and discussions.

Paul Johnson suggested that we could make this a co-sponsor conference to help cover the funds.

Richard Leopold suggested that we probably don't need statutory change, but rather have this fixed through agency evaluation rulemaking. At the same time, I would like to see more predictability offered to the industry so that they know where the bar is set.

Susan Heathcote suggested that ISU has facilitators and may be a good place to start.

Paul Johnson, Dave Petty and Susan Heathcote all agreed to compile an invitee list and possible questions for the discussion meeting. Possible meeting months would include February, March or April 2009.

Motion was made by Charlotte Hubbell to hold a roundtable discussion the day before a commission meeting with the agriculture industry and other interested parties to focus on CAFO rules and the master matrix. Seconded by Susan Heathcote. Motion carried unanimously.

Motion was made by Marty Stimson to move into closed session to discuss strategy with legal counsel on the pending litigation regarding the Dallas Pork and Lincoln 1 Pork, LLC construction permit applications. Seconded by Susan Heathcote. Motion carried unanimously.

-----Commissioners went into Closed Session-----

NEXT MEETING DATES

January 13, 2009 – DNR Air Quality Building - Urbandale, Iowa

ADJOURNMENT

With no further business to come before the Environmental Protection Commission, Chairperson Henry Marquard adjourned the meeting at 5:30 p.m., Monday, November 10 , 2008.

Richard A. Leopold, Director

Henry Marquard, Chair

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